

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

WITH

For Approval and Signature:

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1. Whether Reporters of Local Papers may be allowed
to see the judgements? Yes.

2. To be referred to the Reporter or not? Yes except

JJJ

the () portion.

3. Whether Their Lordships wish to see the fair copy of the judgement? No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge?
No.

SHANUBHAI HEMABHAI VEDAVA VAGHARI

Versus

STATE OF GUJARAT

Appearance:

MS SHILPA R SHAH for appellant.

MR S.P. DAVE, A.P.P. for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 18/02/98

ORAL JUDGEMENT

(Shanubhai Hemabhai Vedva Vaghari prayed for enlarging him on temporary bail for a period of 30 days with a prayer that the appeal might be heard and decided and the appellant might be released on temporary bail for a period till hearing of the appeal.

2. One of the reasons for temporary bail was that the appellant's presence was necessary for finding a match for the appellant's sister who had been of marriageable age. On 16-6-1997 this appeal came to be admitted and final hearing of the appeal was fixed on 3rd July, 1997. Request for bail was, therefore, not pressed at that stage.

3. Besides, there was an office note to the effect that Record and Proceeding of Sessions Case No. 319 of 1995 from which the present appeal arises is required in Sessions Case No. 60 of 1994 for enabling the said sessions case to be attended to and decided bearing in mind the fact that there has been an under trial prisoner in that case. Under the aforesaid circumstances, Criminal Appeal No. 303 of 1997 has been heard.)

4. The present appeal arises from the judgment and order dated 21st March, 1997 rendered by the learned Additional Sessions Judge, Kheda at Nadiad in Sessions Case No. 319 of 1995. By the impugned judgment and order the appellant who has been described as the accused herein came to be convicted of the offence punishable u/s 397 of the I.P. Code and sentenced to undergo rigorous imprisonment for a period of seven years and to pay fine of Rs.5,000/- i/d to undergo rigorous imprisonment for a period of six months and also for the offence punishable u/s 506 (2) of the I.P. Code to undergo rigorous imprisonment for a period of six months and to pay fine of Rs. 500/- i/d to undergo rigorous imprisonment for a period of one month and for the offence punishable u/s 25 (1) (c) of the Indian Arms Act to undergo rigorous imprisonment for a period of one year and to pay fine of Rs. 500/- i/d to undergo rigorous imprisonment for a period of one month. He has been acquitted of the offence punishable u/s 504 of the I.P. Code. He has been directed to undergo substantive sentences as also default sentences one after other. Accused Khemabhai Lakhabhai Vedava Vaghri was acquitted of the offence as aforesaid on account of insufficiency of the evidence against him. Since some of the accused persons were absconding the muddamal was directed to be kept in the safe custody.

5. It so happened that at about 12-00 O'clock at night of 7th August, 1991 complainant Hasmukhbhai Shivabhai Patel was in the company of his wife and children, all of whom were sleeping and when the servant was sleeping in the verandah of the house, some one had thrown battery light. The servant therefore woke up and asked who there was. The persons had run towards the field. Then there was sound of barking of dogs at about 1-00 O'clock at night when one person approached the house of the complainant. The complainant and the servant had come out of the house. At that time 10 to 15 persons armed with sticks and knives were found having come there. They suddenly assaulted the complainant and the servant. The servant was given three to four stick blows and the complainant was caught hold of and brought inside the house and made to sit with his wife and children. While pointing the knife at his chest and while pointing "tamancha" at his wife they were asked to show and give whatever there was in the house. Thereafter, they started opening the bags and baggages and they found cash amount from one attache. They also found ornaments consisting of complainant's wife's necklace, gold earrings, two gold rings, one "mangalsutra", two gold bangles, one silver waist chain (kandora), four pairs of other ornaments, one ear-chain, Rs. 12000/- cash, one watch, four pants and six bush-shirts. All these items valued around Rs. 39,000/-. The persons had taken away the said items while threatening the complainant that if they had spoken anything they would be killed. While leaving the place they also locked the house from outside. They had then gone to the house of his neighbour Shankerbhai, but on account of shouts and other persons reaching the place they had run away. The complainant and the members of his family were brought out from the house. The persons were aged about 30 to 35 years and they were appearing to be of "Vaghari" community. Accordingly, on the complaint of said Hasmukhbhai Shivabhai Patel given on 8th August, 1991 investigation was started. Statements of witnesses were recorded. Panchanama of scene of offence was made.

6. In the meantime as a result of information received on 10th August, 1991 the Investigating Officer had raided the house of one Kalubha Nanubha at village Indranaj and caught hold of three persons who were to run away from the house. They were Vaghari Jilu Lakshaman, Raghu Laxman and Dhamu Lakshaman. Upon search of the house having been conducted some cash amount, watch and other muddamal of gold and silver ornaments were found. All those muddamal articles were seized under the

panchanama. The complainant thereafter was called to identify if any of the articles belonged to him. Upon the complainant identifying his articles in respect of which the panchanama was made and the articles were seized for further investigation, all the aforesaid persons were arrested.

7. The arrested accused persons had shown their willingness to show the muddamal weapons of offence in the presence of the panchas and they in the company of police persons went to village Indranaj and one plastic bag was brought out from the house by the accused persons. The plastic bag was containing one country "tamancha", two live cartridges and one blank cartridge. The said weapons were seized under the panchanama to that effect. Accused Bijal Lakha had identified bush-shirt of the complainant and therefore the same was also seized under the panchanama. The accused persons had of their own informed that the ornaments were sold in Ahmedabad. Hence, the Investigating Officer in the company of the said accused persons reached the shop of goldsmith Soni Mohanlal Shankerlal situated at Manekchowk area within the limit of Astodia Police Station. Soni Mohanlal Shankerlal informed that the muddamal ornaments purchased by him from the accused persons were melted and therefore upon having been asked to produce the ingot, he produced the same before the Investigating Officer and the same was verified and verification certificate about gold contents was obtained and accordingly it was seized under the panchanama. On 3rd November, 1991 the information with regard to accused Vaghari Raja Lakha having been apprehended by the police at Vatva Police Station, Ahmedabad was received and hence after obtaining necessary transfer warrant the said accused was arrested. Further investigation was entrusted to P.S.I. Mr. M.K. Chaudhari. After conclusion of the investigation by him the charge-sheet was filed on 28th November, 1991. The same was registered in the Trial Court as Criminal Case No. 2789/95. The Trial Court committed the case to the Sessions Court where it was registered as Sessions Case NO. 319 of 1995.

8. Charge was framed against two accused persons who were available. They pleaded not guilty to the charge exh. 4. The case was tried and at the conclusion of the trial further statements of the accused were recorded u/s 313 of the Cri. Pro. Code, 1973. After hearing learned A.P.P. for the State and learned defence advocate the learned Additional Sessions Judge rendered conviction and sentence against the accused no. 1 Shanubhai Hemabhai Vedva Vaghari (appellant herein) and acquitted accused

no. 2 Khemabhai Lakhabhai Vedva Vaghari, as stated above.

9. I have heard learned advocate appearing for the appellant - accused Shanubhai Hemabhai Vedava Vaghari and learned A.P.P. for the State - respondents.

10. The oral evidence placed on record of the case consists of the complainant P.W. No. 1 Hasmukhbhai Shivabhai Patel Exh. 8, P.W. No. 2 Laljibhai Bhagubhai Desai Exh. 11, P.W. No. 3 Mohanlal Shankerbhai Rana exh. 14, P.W. No. 4 Nayanaben Hasmukhbhai Patel wife of the complainant exh. 17, P.W. No. 5 Rajubhai Raojibhai Patel exh. 18, P.W. No. 6 Maganbhai Mathurbhai Patel exh. 21, P.W. No. 7 Raysingbhai Lallubhai exh. 22, P.W. No. 8 Kalidas Manilal Jhala Exh. 25 and I.O. Karansinh Arjunsinh Chauhan Exh. 26. Panchanamas appearing at Exhs. 12, 13, 19, 20, 23 and 24 have been placed on record. The complaint appears at exh. 10.

11. Dealing with the aforesaid evidence, the learned Sessions Judge has placed reliance upon the eye witnesses being complainant Hasmukhbhai Shivabhai Patel and his wife Nayanaben Hasmukhbhai Patel having identified the accused Shanubhai Hemabhai Vedva Vaghari as person who was armed with "tamancha" and as one of the dacoits, having taken active part in the offence. The complainant has identified both the accused persons. The complainant's wife Nayanaben also identified the present accused Shanubhai Hemabhai Vedva Vaghari. There was no necessity to hold test identification parade on account of the fact that both the witnesses had occasion to see the accused persons face to face and they had to face the present accused uttering, intimidating, threatening and committing dacoity and taking away the aforesaid muddamal articles and cash. The learned Additional Sessions Judge has also come to the conclusion that although "tamancha" was not recovered at the instance of accused no. 1, he was armed with "tamancha" as deposed by both the eye witnesses. He has further held that the place of dacoity was shown by the present accused as per the relevant panchanama in that respect. The accused persons had taken active part in commission of dacoity. He had addressed the complainant to put down "dharria" which the complainant had with him by threatening that he would fire "tamancha" which was loaded with cartridge. Two to three days after the incident, the complainant was called at Tarapur Police Station where having been shown some arrested persons the complainant had identified four persons out of whom two were those who were present in

the Court. The learned Additional Sessions Judge has made reference to the panchanama with regard to recovery of gold ingot from the goldsmith, as aforesaid. Learned Additional Sessions Judge has also made reference to the panchanama with regard to recovery of the weapons and muddamal articles, as aforesaid. Bearing in mind all the facts and circumstances of the case appearing before the Court and placing reliance on the evidence of the complainant and his wife Nayanaben learned Additional Sessions Judge found the present accused guilty of the offence, as aforesaid.

12. It has been submitted on behalf of the accused before this Court that it would not be possible for any person and in that matter even for the complainant and his wife Nayanaben when neither of them knew him before the date of incident to identify him in the Court. According to her submission it was dark midnight and the complainant and his wife could not have proper opportunity to see and remember the figure of the accused persons. According to her submission, no detailed description of the accused persons was given by the complainant and his wife at the earliest possible time. Hence, in absence of test identification parade the learned Additional Sessions Judge ought not to have relied upon the evidence of the complainant and his wife Nayanaben for convicting the present accused. She submitted that there was no reason for differentiating the present accused from the accused who was acquitted by the Court. In support of her submission, she has made reference to following decisions of the Apex Court.

- i. Budhsen and another Vs. State of U.P.,
reported in AIR 1970 SUPREME COURT, 1321,
- ii. Harnath Singh Vs. State of M.P.,
reported in AIR 1970 SUPREME COURT, 1619,
- iii. Wakil Singh Vs. State of Bihar, reported
in AIR 1981 SUPREME COURT 1392,
- iv. Mohanlal Gangaram Gehani Vs. State of
Maharashtra, reported in AIR 1982 SUPREME
COURT 839, and
- v. Bollavaram Pedda Narsi Reddy and others
Vs. State of A.P., reported in AIR 1991
SUPREME COURT 1469.

13. Dealing with the provision contained in Section 9 of the Evidence Act and referring to the decision in the

case of Nazir Ahmad Vs. King Emperor reported in AIR 1936 PC 253 and decision in the case of Ramkrishnan Mithanlal Sharma V. State of Bombay, reported in AIR 1955 SC 104 the Apex Court observed in Harnath's case (supra) that during investigation of crime the Police has to hold identification parades for the purpose of enabling the witnesses to identify the properties which are the subject-matter of the offence or to identify the persons who are concerned therein. They have thus a two fold object: first to satisfy the investigating authorities that a certain person not previously known to the witnesses was involved in the commission of the crime or particular property was the subject of the crime and it is also designed to furnish evidence to corroborate the testimony which the witness concerned tenders before the Court. Following observations appearing at page no. 114 in Ramkrishnan's case reported in AIR 1955 SUPREME COURT 104, quoted in Harnath's case might also be reproduced here.

"..... it is clear that the process of identification by the identifying witnesses involves the statement by the identifying witnesses that the particular properties identified were the subject-matter of the offence or the persons identified were concerned in the offence. This statement may be express or implied. The identifier may point by his finger or touch the property or the person identified, may either nod his head or give his assent in answer to a question addressed to him in that behalf or may make signs or gestures which are tantamount to saying that the particular property identified was the subject matter of the offence or the person identified was concerned in the offence. All these statements express or implied including the signs and gestures would amount to a communication of the fact of identification by the identifier to another person..... The distinction..... between the mental act of identification and the communication thereof by the identifier to another person is quite logical and such communications are tantamount to statements made by the identifiers... Physical facts of identification has thus no separate existence apart from the statement involved in the very process of identification..."

14. In Budhsen's case it has been observed that as a general rule, the substantive evidence of a witness is a statement in the Court. The evidence of mere

identification of the accused person at the trial for the first time is from its very nature inherently of a weak character and hence the purpose of a prior test identification is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceeding.

15. In Wakil Singh's case, no description of the dacoits was forthcoming in the statement of the witnesses or in the oral evidence which they had given before the Court and no identification marks such as stature of the accused or whether they were fat or thin or of fair colour or black colour, were also disclosed. Under such circumstances, the Supreme Court found it impossible to convict any accused on the basis of a single identification in which case also reasonable possibility of mistake in identification could not be excluded. In so far as the present case is concerned, the accused persons herein had passed considerable time inside the house in front of the complainant and his wife Nayanaben. Besides, there was prominent figure of the present accused holding "tamancha" in his hand uttering abuses and intimidating and threatening and also participating in dacoity. On verification of the statement of Nayanaben at the instance of learned advocate for the appellant it could also be noticed that there were electricity lights inside the house. Thus, the complainant and his wife must have had clear figure of the person before them duly impressed in their mind and the complainant also could know the persons as the persons belonging to the Vaghari community in the village area. Hence, the facts of the Wakil Singh's case will not be of any help to the accused herein.

16. Reliance has been placed in what is stated in para 20 of the decision in the case of Mohanlal (supra). In that case, the concerned witness did not know the appellant before the occurrence and no test identification parade was held to test his power of identification and he was also shown by the police before he identified the appellant in the Court. Under such circumstances, his evidence was held to have become absolutely valueless on the question of identification. It might be noted that in that case aforesaid observations have been made by the Supreme Court in the context of evidence of p.w. no. 5 Shetty who did not

know the accused before the occurrence and yet the accused was shown to him by the police at the police station. The facts of the present case are quite different and distinct.

17. In the last mentioned decision in the case of Bollavaram Pedda Narsi Reddy (supra) the facts of the case would indicate that there was no natural light available and street light was at a distance from the place of occurrence. In that back ground, it has been observed that when no natural light was available and street light was at distance it would be unlikely that the eye witness by momentary glance of the assailants who surrounded the victim had a lasting impression and the chance of identifying the assailants without mistake. It has been observed that the credibility of the evidence relating to the identification depends largely on the opportunity the witness had to observe the assailants when the crime was committed and memorize the impression. It might be at once noted from the facts of the present case that there are number of circumstances which would indicate that the complainant and his wife Nayanaben had quite sufficient opportunity to observe particular dacoit/s when the crime was committed and memorize the impression of such dacoit/s in the context of what happened, in the context of how they acted, in the context of what weapons they held, in the context of what role he/they then played. Besides, there is sufficient evidence to corroborate the ocular account of the complainant and his wife Nayanaben in the form of recovery panchanama, as aforesaid. In that view of the matter, when the evidence of the eye witnesses inspires confidence and when learned Additional Sessions Judge has observed them giving evidence before him and when he found the present accused having been without hesitation pointed out by both, the complainant and complainant's wife there is no reason why this Court should differ from the trial Court's conclusion.

18. Following decisions of the Supreme Court, were brought to the notice of the learned advocate for the appellant.

- i. Kanta Prasad Vs. Delhi Administration,
reported in AIR 1958 SUPREME COURT 350.
- ii. Delhi Administration Vs. Bal Krishan,
reported in AIR 1972 SUPREME COURT 3.
- iii. Nagappa Dondiba Kalal Vs. State of
Karnataka, reported in AIR 1980 SUPREME

19. Following observations might be noted from the decision in the case of Kanta Prasad (supra).

"It would no doubt, have been prudent to hold a test identification parade with respect to witnesses who did not know the accused before the occurrence, but failure to hold such a parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification would be a matter for the Courts of fact and it is not for this Court to reassess the evidence unless exceptional grounds were established necessitating such a course."

20. In Bal Krishan's case (supra) it has been observed that it is not a proposition of law that after lapse of a long period, witness would, in no case, be able to identify the dacoits they had seen in the course of a dacoity committed during the night, although the Courts must be extremely cautious when such evidence is before them.

21. In the last decision in the case of Nagappa Dondiba Kalal, it has been observed that identity of the ornaments recovered at the instance of the appellant was fully established inasmuch as the deceased in that case had been wearing these ornaments when she left the house on the night of particular day and recoveries were made three days thereafter. Under such circumstances, the High Court was held to be justified in acting on the evidence of these witnesses and in rejecting the arguments of the accused that as no test identification parade was held, the identity could not be established.

22. Having heard learned advocate appearing for the accused at length and also having heard learned A.P.P. for the State, I am of the opinion that the learned Additional Sessions Judge has not committed any error in placing reliance upon the oral evidence of the complainant and his wife Nayanaben who have been supported by number of circumstances as also by panchanama of scene of offence as well as recovery panchanama. He has been cautious in discarding the prosecution case against accused no. 2 who was not identified by Nayanaben in the Court.

23. In the result, this appeal deserves to be dismissed and the same is dismissed.

(24. In view of the fact that this appeal has been dismissed Cri. Misc.. Application No.441 of 1998 does not survive and hence the same is dismissed. Rule is discharged in said Cri. Misc. Application.

25. R & P of Sessions Case No. 319 of 1995 from which the present appeal arises shall immediately be transmitted as per request of learned Additional Sessions Judge, Kheda at Nadiad. The office note will accordingly stand disposed of.)

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